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No. 85-136

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

HUGH P. MULVEY, JR., Individually,
and as Class Representative,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the discretionary district court decision denying a motion to intervene because the motion, filed almost ten years after relief was granted, was untimely, failed to allege a change in circumstances either in law or in fact and failed to allege facts to support the conclusory allegations that the movant's interests were not adequately represented.

PARTIES

Commonwealth of Pennsylvania and Guardians of Greater Pittsburgh, Inc.; National Association for the Advancement of Colored Pecple - Pittsburgh Branch; National Organization for Women - Southwestern Pennsylvania Council of Chapters; Donald Allen, Benjamin Ashe, Jerome Aziz, Richard Hurt, Adam Kinsel, Lynnwood Scott and Richard Stewart; J. Terese Doyle; Cheryl Edmonds, Rose Mitchum, Linda Robinson, Joanne Rowe, Deborah Smith and Gloria Vanda; Harvey Adams, Mack Henderson, Theodore Saulsbury and Charles Tarrant; Gladys Smith; Peter F. Flaherty; Robert J. Coll; Stephen A. Glickman; Albert Statti and Edward J. English; Melanie J. Smith; City of Pittsburgh; Fraternal Order of Police.

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OPINIONS BELOW

The memorandum opinion of the Court of Appeals and the memorandum order the District Court are not reported. Copies are attached to the petition for certiorari as appendices B and A respectively.

JURISDICTION

The final judgment of the court of appeals was entered on March 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner is a white male who has applied for a position as a Pittsburgh police officer continuously since 1975, taking appropriate examinations and maintaining his eligibility. On August 22, 1984, petitioner moved to intervene in a 1975 action that had challenged the hiring and promotion practices of the Pittsburgh Bureau of Police.

That action was filed in the United States District Court for the Western District of Pennsylvania by the Commonwealth of Pennsylvania, together with the NAACP and other groups and individuals, against the City of Pittsburgh and its officials. It alleged unlawful racial and sexual discrimination in police hiring and promotions.

By order of December 5, 1975, the District Court found that the Pittsburgh Bureau of Police hiring and promotion practices violated 42 U.S.C. §§ 1981 and 1983 and the Thirteenth and Fourteenth Amendments of the United States Constitution. No appeal was filed from that order.

By order of May 24, 1979, the district court granted the City of

Pittsburgh's motion for temporary modification of the preliminary injunction when one of the hiring lists was exhausted. This modification continued through December 1, 1979. The Fraternal Order of Police, which intervened as a defendant in 1975, filed a motion early in 1984 to terminate preferential affirmative promotions previously ordered. That motion was denied by the District Court and the Court of Appeals without prejudice to the intervenor's right to file a motion alleging changed circumstances.

By memorandum order of August 30, 1984, petitioner's motion to intervene was denied because the District Court found it was untimely, that it failed to allege changes in circumstances or law which affect the basis of the original

order, and because of petitioner's failure to advance any argument that had not been thoroughly presented and considered before the entry of the original order. The District Court also observed that when it granted the preliminary injunction in 1975, it recognized that, although it was only affording interim relief, the remedy would require a long period of time because of the small number of vacancies that occur in the Bureau of Police. The District Court also noted that the motion to intervene failed to allege that the disproportion, which was the result of the past discriminatory hiring practices, had ended.

Petitioner appealed denial of his motion to intervene to the Court of Appeals. The Court of Appeals held that

the District Court had not abused its discretion in finding petitioner's motion to intervene to be untimely. The Court of Appeals also agreed with the District Court that the motion should be denied, even if considered timely, because the petitioner had failed to allege a change in circumstances either in law or in fact and failed to support the conclusory allegation that his interests were not adequately represented by existing parties.[1]

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[1] The Court of Appeals also found no abuse of discretion in the District Court's decision not to hold a hearing on the motion to intervene because the motion was untimely on its face and could be denied without one. That issued is not pressed here.

Subsequently, Mulvey filed a petition for writ of certiorari and this Court requested a response to the petition.

ARGUMENT

Certiorari should not be granted to review a District Court decision which denied a motion to intervene because it was untimely, it failed to assert changes in circumstances in law or fact, or to show that the movant's interests were not adequately represented. The ruling was discretionary and properly affirmed by the Court of Appeals.

Federal Rule of Civil Procedure 24 establishes timeliness as a prerequisite for intervention. In NAACP v. New York, 413 U.S. 345, 365-366 (1973), this Court stated:

> Whether intervention be claimed of right or as permissive, it is at once apparent from the initial words of both Rule 24(a)

> and 24(b), that the application must be 'timely'. If it is untimely, intervention must be denied.

Rule 24 is silent as to what constitutes a timely application for intervention. It has, however, been uniformly held throughout the courts of appeals that the determination of timeliness is left to the informed discretion of the district court.[2]

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[2] E g., Garrity v. Gallen, 697 F.2d 452, 455 (1st Cir. 1983); Donovan v. United Steelworkers of America, AFL-CIO, 721 F.2d 126 (3d Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 3535 (1984); Holsey v Armour & Co., 743 F.2d 199, 205 (4th Cir. 1983); Jones v. Caddo Parish School Board, 735 F.2d 923 (5th Cir. 1984); Michigan Association for Retarded Citizens v. Smith, 657 F.2d 102, 105 (6th Cir. 1981); Sanquine, Ltd. v. United States Department of Interior, 736 F.2d 1416, 1418 (10th Cir. 1984); United States v. Jefferson County, 720 F.2d 1511, 1516 (11th Cir. 1983).

To determine whether or not a district court has abused its discretion with regard to denial of intervention because of untimeliness, this Court has adopted a "totality of circumstances" test. Under this test, this Court in NAACP v. New York, supra, reviewed a denial of a motion to intervene on the basis of four factors:

(1) the length of time the petitioner knew or should have known of the pendency of the suit;

(2) the promptness with which the petitioner acted once aware of the suit;

(3) unusual circumstances warranting intervention;

(4) unusual circumstances militating against intervention.

As the Court of Appeals observed, petitioner was an applicant for employment with the Pittsburgh Police Department from 1975 until he filed his motion to intervene nine years

later. Petitioner knew or should have been aware of his alleged interest from the time of his application to be a Pittsburgh police officer until this motion to intervene was filed nine years later. Similarly, petitioner waited nine years after becoming aware of the suit to file his motion.[3]

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[3] Petitioner alludes in his present petition to a change in the law as a factor warranting intervention, relying upon Washington v. Davis, 426 U.S. 229 (1976). Washington v. Davis was decided eight years before his attempted intervention. Petitioner has provided no justification for his failure to act promptly. In addition, on August 15, 1977, the Fraternal Order of Police, which had intervened as a defendant in 1975, filed a motion to dissolve the injunction on the basis of Washington v. Davis, supra. The motion was denied and no appeal was taken. See Com. of Pa. v. Flaherty, unreported opinion (W.D. Pa. 1977), attached to petition as appendix C. Neverthless, petitioner failed to act promptly in order to preserve an appeal. See United Airlines, re. v. McDonald, 432 U.S. 385, 395-396 (1977).

In his motion to intervene petitioner failed to assert any unusual circumstances that would warrant intervention, particularly with regard to a nine year delay. Further militating against intervention is the fact that the decree was entered in 1975 and the District Court contemplated that the interim relief would take time to implement. The District Court stated:

> We cannot, with the present number of vacancies to be filled, overcome the effect of past disproportion in short order, but we can make a beginning and, with the passage of time, hope to see this imbalance reduced as the older members of the force pass into retirement and the new appointees begin to fill the ranks.

Com. of Pa. v. Flaherty, 404 F.Supp. 1022, 1029 (W.D. Pa. 1975). There are no extraordinary circumstances present. Thus, under this Court's totality of circumstances test, the Court of Appeals properly affirmed the District Court's denial of intervention as untimely.

In addition to petitioner's motion to intervene being properly denied as untimely, denial of intervention of right is also proper because petitioner's interest is already adequately represented by the existing parties. Fed.R.Civ.P. 24(a)(2); see also Trbovich v. Mine Workers, 404 U.S. 528, 538 (1972). Representation by the existing parties is generally deemed adequate unless there is collusion between the representative parties and an opposing party, the representative parties interests are adverse to the

proposed intervenor, or the representative parties have not been diligent in pursuing litigation. Delaware Valley Citizens' Council v. Commonwealth of Pennsylvania 674 F.2d 970, 973 (3rd Cir.), cert. denied, 458 U.S. 1125 (1982). Petitioner's motion to intervene failed to allege any basis upon which the District Court could have concluded that his interest was not adequately represented. Indeed, the only reference to adequate representation in the motion was a conclusory statement in paragraph 7 that intervenor's interest is not adequately represented by existing parties. There is no allegation of collusion, that existing parties represent an interest adverse to the proposed intervenor, or that there had been a lack of diligence in pursuing the litigation.

The City of Pittsburgh has continuously defended this action. In fact, the preliminary injunction was temporarily modified at the City's request from May 24, 1979 to December 1, 1979, and a portion of the relief ordered was clarified upon motion of the City of Pittsburgh in 1982. The Fraternal Order of Police, which intervened in 1975, filed a motion to dissolve the injunction in 1977 relying on Washington v. Davis, supra. This motion was denied and no appeal was taken. Although petitioner apparently disagreed with the decision not to appeal, a difference of opinion as to tactics does not constitute lack of adequate representation of interests. See Bumgarner v. Ute Indian Tribe, 417 F.2d 1305 (10th Cir. 1969). Further, a decision not to take an

appeal does not itself show inadequate representation of interests. Acuff v. United Papermakers, 404 F.2d 169 (5th Cir.), cert. denied 394 U.S. 987 (1968).

Rule 17 of the Rules of this Court sets forth the considerations governing review on certiorari. The question presented, as stated by petitioner, is whether or not the District Court and the Court of Appeals properly determined that the motion to intervene was untimely and that petitioner's interests were adequately represented by the existing parties. It is clear that this challenge to the discretion of the District Court fails to address any of the considerations set forth in Rule 17 and the petition should be denied.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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